DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-59/49875

PRELIMINARY RECITALS

Pursuant to a petition filed July 17, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Sheboygan County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on August 22, 2001, at Sheboygan, Wisconsin.

The issue for determination is whether the Community Spouse Resource Allowance (CSRA) may be increased to bring the community spouse's monthly income up to the Minimum Monthly Maintenance Needs Allowance (MMMNA).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	Represented by:
(petitioner)	Michael Vowinkel 607 North 8th St 7th Floor Sheboygan, WI 53081-4556

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Tim Gessler, ES Supervisor
Sheboygan County Dept Of Human Services
3620 Wilgus Ave
Sheboygan, WI 53081

ADMINISTRATIVE LAW JUDGE:
Joseph A. Nowick
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Sheboygan County.

2. On April 30, 2001, the petitioner applied for institutional MA.

3. On or about April 30, 2001, the petitioner and his spouse had about $155,179 of nonexempt assets. The county agency used that figure to find that the maximum total household assets could be about $79,589.73.

4. At the time of application, (petitioner spouse), the community spouse, had an income of about $515 per month.

5. On June 26, 2001, the county agency notified the petitioner that he was ineligible for MA. The basis of the denial was that the MA household had excess assets. The county agency determined that the maximum total assets for eligibility would be about $79,589.73.

6. Included in the total household assets are two MetLife life insurance policies with a combined face value of $2,000 and a combined cash value of about $3,290. Also, there is a Sun Life annuity and a Valuemark annuity that have a current combined worth of $53,000. None of these assets are exempt or produce a cash flow.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. See the MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

In May, 2001, the county determined that the current asset allowance for this couple is about $77,600. See the MA Handbook, App. 23.4.2, which is based upon Wis. Stat. §49.455(6)(b). $2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy. If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance in this case is $1,875. MA Handbook, Appendix 23.6.0 (5-1-00).

Wis. Stat. §49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part as follows:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

Based upon the above, a hearing examiner can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the hearing examiner first must allocate resources to maximize the community spouse's income, and only if the resources' income does not bring the community spouse's income up to the monthly minimum can the institutionalized spouse's income be allocated. The Blumer decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

The problem for the petitioner is that the key principle behind Blumer is that it allows assets to be reallocated so that they can generate income. Thus, if an asset is not generating income, it may not be reallocated. There would be no reason to do so. Only resources that generate income can be reallocated by the Fair Hearing process so as to be included in the CSRA. Wis. Stat. § 49.455(8)(d) (1995-96); Final Decision, DHA Case No. MRA-70/15380 (Department of Health and Family Services August 19, 1997) adopting Proposed Decision, DHA Case No. MRA-70/15380 (Wis. Div. Hearings & Appeals July 2, 1997). See also MRA-5/35807 (Wis. Div. Hearings & Appeals October 22, 1998).

There is a good deal of support for requiring an asset to generate income in order to be reallocated. The Medicaid Catastrophic Coverage Act of 1988 (MCAA) is actually an attempt to balance two public policy goals. First, it is designed to protect the community spouse from impoverishment due to the nursing home bills of the institutionalized spouse. That is why Congress allowed the transfer of certain resources. On the other hand, Congress did not want to enable those couples with large resources to shield them so that the public would be obligated to pay for the necessary nursing home care.

Based on this balance, Congress approved reallocating resources that would generate income to enable the community spouse to reach the "minimum monthly maintenance needs allowance" (MMMNA). It only makes sense then that if a resource is to be reallocated, it must produce income to the community spouse to meet that goal. A resource, which does not provide income to the community spouse, is not fulfilling the intended purpose.

Several courts have used the same analysis. In Ann O'Callaghan v. Commissioner Of Social Services, 53 Conn.App. 191, 729 A.2d 800, pages 809-10 (1999), the court stated:

> Section 1396r-5(e)(2)(C) provides that if either spouse "establishes that the community spouse resource allowance ... is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), *an amount adequate to provide such a minimum*

> *monthly maintenance needs allowance.*" (Emphasis added.) 42 U.S.C. § 1396r-5 (e)(2)(C). The minimum needs allowance represents the minimum amount of income a community spouse needs to meet her basic needs. See 42 U.S.C. § 1396r-5 (d)(3); *Cleary v. Waldman*, supra, 959 F.Supp. at 231 (minimum needs allowance is "an amount designed to ensure that the community spouse has an income ... above the official poverty line"). We conclude that since the purpose of the transfer of resources is to provide sufficient income to meet the monthly maintenance needs of the community spouse, the resources that are transferrable must be resources that will provide a regular stream of income to the community spouse. Resources that would generate moneys for the community spouse only upon their sale do not serve the purpose of the statute and do not qualify as income producing resources that would be transferrable to the community spouse under § 1396r- 5 (e)(2)(C). Transferring to the plaintiff's resource allowance resources that generate only capital gains would not provide her with any additional monthly income that she could use to meet her minimum monthly maintenance needs. Accordingly, resources that generate only capital gains cannot be considered income producing under § 1396r-5 (e)(2)(C).

Although the O'Callaghan case deals with capital gains, the principles apply to life insurance as well. The insurance policy is not providing (petitioner spouse) with any additional monthly income to help her reach her MMMNA. (See also Gruber, v. Ohio Department Of Human Services, 98 Ohio App.3d 72, 647 N.E.2d 861 (1994). In that case, the court not only held that the community spouse may not "shelter" resources by using investments that have no distributed income but that the rate of return must be reasonable.) In Proposed Decision MRA-68/48394, ALJ Sean Maloney similarly ruled that an insurance policy that did not pay out generated income could not be reallocated. He stated the following in his analysis:

> An increase in the value of a life insurance policy due to the payment and reinvestment of dividends is not the same as the generation of income. The cash value of a life insurance policy is to be counted as an asset for MA purposes -- not income. Life insurance policy dividends are to be disregarded as income for MA purposes. MA Handbook, Appendix 11.6.5 & 15.2.16. Likewise, for purposes of the federal Supplemental Security Income Program (SSI) program dividends paid on life insurance policies are not income. POMS SI 00830.500(C) (June 2001). For SSI, life insurance policy dividend accumulations are an asset, not income. POMS SI 01130.300(A)(5)(b) & (B)(1) (June 2001); See also, 20 C.F.R. §§ 416.1103(c), 416.1207(b) & 416.1230 (2000).

The DHFS Secretary adopted this Proposed Decision as the final Order on July 19, 2001. Thus, it is the policy of that department that the "income" generated by an insurance policy that is not distributed is not income but actually becomes part of the asset. This means that the MetLife life insurance policies with a total cash value of about $3,290 can not be reallocated to the community spouse. It remains a countable asset of the petitioner's. Obviously, the cash value exceeds the MA asset limit of $2,000, making him ineligible for MA not only as of the date of application, but also as of the date of the hearing.

(petitioner spouse) argued that the MetLife policies do generate money in the form of an increased cash surrender value. However, it does not generate income to be paid out. It is possible to take out a loan against the cash value. If a loan was taken in the amount of the cash value, total assets could have been reduced to less than $2,000. Or, the policies may be converted to an exempt asset if it designated for burial purposes as prescribed in the MA Handbook, Appendix 11.

This same analysis also applies to the Sun Life annuity and the Valuemark annuity. (petitioner spouse) stated that she could change the annuities so that she would get a monthly benefit. The point is that as of the date of application and even the date of the hearing, neither she nor the petitioner received any income from either annuity. Thus, it cannot be reallocated. I would recommend that the petitioner and his spouse convert any asset that is not producing an income to either an exempt asset or to one that will provide a reasonable rate of return that will allow (petitioner spouse) to reach her MMMNA.

CONCLUSIONS OF LAW

1. All of the non-exempt assets of petitioner and his wife that generate income may be reallocated to his wife to maximize her monthly income.
2. Non-exempt assets that do not generate an income may not be reallocated.
3. The petitioner had excess assets due to the cash value of his life insurance policy and the annuities.

NOW, THEREFORE, it is ORDERED

That the petition for review be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent. The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this _____ day of _____, 2001.

Joseph A. Nowick
Administrative Law Judge
Division of Hearings and Appeals
928/JAN

cc: Kathy Winter- Sheboygan Co.
Susan Wood
Michael Vowinkel-Rohde, Dales